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Foreword: Confronting the Rights Deficit at Home and Abroad

Ruben J. Garcia
California Western School of Law, rjg@cwsf.edu

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FOREWORD: CONFRONTING THE RIGHTS DEFICIT AT HOME AND ABROAD

RUBEN J. GARCIA^{*}

I. INTRODUCTION

In 2005, Hurricane Katrina exposed a rights deficit on the Gulf Coast. At the end of August 2005, legacies of racial, economic and social inequality were laid bare on the nation's televisions and computer screens. More than a year later, one can look at any number of measures of progress and the lack of progress in New Orleans—the lack of reconstruction, labor rights violations, the depopulation of the city, and the tenuous nature of the emergency response system.¹ And

^{*} Associate Professor of Law, California Western School of Law, San Diego. I must thank the many, many people who made the 2006 Western Law Professors of Color Conference at California Western possible, in particular the Law School, its staff, and its faculty of color. Other law schools sent financial support and their excellent faculty to the Conference, including Thomas Jefferson School of Law, Loyola Law School Los Angeles, and the law schools at Arizona State University, Chapman University, University of California, Davis, and the University of Southern California. Thanks to the editors of the California Western Law Review and the California Western International Law Journal for their support of the Conference and their editing of this issue. Thanks as well to Dwayne Stein, J.D. Candidate, California Western School of Law, 2008, who provided research assistance for this Foreword.

1. Sam Quinones, *Many of Katrinas Migrant Workers Go Unpaid*, L.A. TIMES, Sept. 11, 2006, at A1. Gary Younge, *New Orleans Forsaken*, THE NATION, Sept. 18, 2006, at 17-18; *Morning Edition: Nearly 10,000 Spend Thanksgiving in FEMA Trailers*, (NPR radio broadcast Nov. 23, 2006), available at

yet, there is also the story of progress: growing activity in the city and the reawakening of civic culture.² Similar phenomena can be seen throughout the Gulf Coast regions affected by Hurricane Katrina.³

The mixed picture of progress in the Gulf Coast region is emblematic of the “rights deficit” facing people of color and low socioeconomic status in their relations with governments and large corporate actors.⁴ The 2006 Western Law Professors of Color Conference took the rights deficit as its theme. The idea of a rights deficit is useful because like the national debt, the rights deficit fluctuates with temporary progress but remains a mountainous hurdle to surmount.

Although the Conference was held in San Diego at the southwestern edge of the United States, scholars from all over the country and from multiple disciplines were represented. They brought diverse perspectives to a wide array of issues, not limited to the rights deficit on the Gulf Coast. This issue of the *California Western Law Review* represents a sample of the diverse, multidisciplinary perspectives presented at the Conference. In this Foreword, I will introduce the idea of the rights deficit by linking it to related debates—first on the nature of rights and second on whether there are domestic and international “democracy deficits.” Then, I will describe the essays from the Conference in the three groups in which they appear in this issue. One group of essays focuses on the aftermath of Hurricane Katrina for the domestic rights deficit. In the area of education law and policy, the issue is not just the rights deficit, but also the deficit in remedies and resources for racial disparities. Another essay broadens the lens of the

<http://www.npr.org/templates/story/story.php?storyId=6529452&sc=emaf>.

2. Steve Brown, *Big Comeback: New Orleans' Hospitality Sector Rallies To Make Huge Convention a Success*, DALLAS MORNING NEWS, Nov. 11, 2006, at 1D; Craig Guillot, *Good Times Slowly Rolling Back*, WASH. TIMES, Aug. 19, 2006, at D1; Anne Kornblut & Adam Nossiter, *Gulf Coast Marks a Year Since Katrina*, N.Y. TIMES, Aug. 29, 2006, <http://select.nytimes.com/gst/abstract.html?res=FA0617F73A5A0C7A8EDDA10894DE404482>.

3. Guillot, *supra* note 2.

4. See Sheryl Cashin, *Katrina: The American Dilemma Redux*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 29, 32 (David Dante Troutt ed., 2006) (“Today 24 percent of black folks still live in poverty—about double the national average. . . . [T]oday there are more black men behind bars than there are in college”); David Dante Troutt, *Many Thousands Gone, Again*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA, *supra*, at 3.

Conference to look at the international dimensions of the rights deficit. I conclude by looking at the impact of rights deficits for people of color and how the rights deficit measures progress in the lives of people of color.

II. THE CONCEPT OF THE RIGHTS DEFICIT

The Conference's organizing theme encouraged panelists and participants to see issues affecting people of color in long-view, continuing terms. The rights deficit, like the national debt, is something that is carried on from generation to generation. Although Hurricanes Katrina and Rita were discrete events, their damage was amplified by the wide gulf of poverty and deprivation that existed before late August and early September 2005 when these two hurricanes affected Alabama, Florida, Louisiana, Mississippi, and Texas. A "rights deficit" has also been identified in other areas, ranging from labor rights⁵ to the law affecting Native Americans.⁶

The rights deficit is similar to the "debt" that reparations scholars argue the United States owes blacks.⁷ The descendants of slaves argue that economic deprivation and disparities in wealth are traceable to the legacy of racial discrimination.⁸ The economic deficit from slavery might be quantified in a number of ways, but the effects in relative economic status of blacks and whites are reasonably clear.⁹ The rights deficit, by contrast, is the more ephemeral lack of opportunity to enforce rights, not a question of whether the rights actually exist in case and statutory law.

5. See Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225 (2006) (describing the labor rights deficit on an international scale).

6. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

7. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES BLACKS* 228 (2000) (discussing how intergenerational discrimination results in a continuing snowball of wealth advantages for white Americans); Robert Westley, *Many Billions Gone: Is It Time To Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998), 19 B.C. THIRD WORLD L.J. 429 (1998).

8. See Cashin, *supra* note 4.

9. See *id.*

The question of whether rights deficits are a useful paradigm for measuring social progress has a long pedigree. Mark Tushnet, in his *Essay on Rights* questioned whether rights, or rights claims, could sometimes be “affirmatively harmful.”¹⁰ Tushnet argued for a greater emphasis on needs than rights.¹¹ Other Critical Legal Studies and Critical Race scholars have countered that rights play important roles in the advancement of people of color.¹² Although both sides of the debate have attempted to reconcile their differences,¹³ tensions about rights claims remain. Hurricane Katrina showed the deprivation that existed before the devastation and the lack of rights in the post-hurricane rebuilding process. Thus, all sides of the debate between rights and needs can point to Katrina as evidence to support their assertions.

The idea of a “deficit” is not limited to the ability to enforce discrete rights. In today’s global economy, a growing issue is the “democracy deficit.”¹⁴ Here, the issue is whether people of color have an equal say in American democracy. The democracy deficit manifests itself in the United States through voting rights violations and lack of access to courts to enforce existing rights. In the aftermath of Hurricane Katrina, problems of access to the ballot box for people of color and the large influx of migrants working on the reconstruction who are unrepresented in the political process have exacerbated the democratic deficit on the Gulf Coast.¹⁵ The large number of noncitizens who

10. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984).

11. *Id.* at 1394.

12. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991).

13. See Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358-66 (1988). See generally *Symposium: Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

14. See generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004) (describing the ways that global institutions might be created to bridge global democratic deficits); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (describing how global institutions such as the International Monetary Fund and the World Bank contribute to the global democratic deficit).

15. See John Valery White, *The Persistence of Race Politics and the Restraint of Recovery in Katrina’s Wake*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA*, *supra* note 4 at 41, 46-47. The

are people of color facing similar situations widens the democracy deficit.

Ultimately, the rights deficit is a lens, albeit imprecise, for viewing the disparities between people of color and whites in the contemporary global environment. Hurricane Katrina also showed a large number of whites who were unable to respond to the hurricane's wrath. Focusing on the deficits faced by people of color does not imply that poor whites are not also facing a deficit in terms of wealth and participation.¹⁶ Even though Katrina affected many areas of the Gulf Coast, its wrath has been disproportionately borne by African-American areas such as the Lower Ninth Ward of New Orleans.¹⁷ Thus, for several reasons, the Conference focused on the rights deficit for people of color.

III. THE SYMPOSIUM: THE RIGHTS DEFICIT AT HOME AND ABROAD

This issue of the *California Western Law Review* begins with Professor Maria Isabel Medina's moving first-person account as a survivor of Hurricane Katrina.¹⁸ Recounting her life experience as a young immigrant from Cuba who is now a citizen and respected scholar of immigration law, Medina is perfectly situated to describe the displacement felt by many "refugees" of the Gulf Coast. Jonathan Hooks and Trisha Miller provide a comprehensive account of some of the pale promises and structural imbalances of disaster relief to which Professor Medina alludes.¹⁹ Rea Holmes, in *How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters*, highlights the

migrant construction workers are also most likely to be victimized by unscrupulous contractors. *Id.* at 46-47.

16. Although the media showed some white residents of New Orleans in difficult situations because of the hurricane, these hurricane victims were framed differently than black victims. See Cheryl I. Harris & Devon W. Carbado, *Loot or Find?*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA*, *supra* note 4, at 87.

17. Anna Badkhen, *Hurricane Katrina, One Year Later: No Light Yet for New Orleans' Ninth Ward*, SEATTLE POST-INTELLIGENCER, Aug. 27, 2006, at D6.

18. Maria Isabel Medina, *Confronting the Rights Deficit at Home: Is the Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency*, 43 CAL. W. L. REV. 9 (2006).

19. Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21 (2006).

democracy deficit facing former residents of New Orleans in trying to exercise the franchise in a changing electoral environment.²⁰ Finally, Professor Rachel Van Cleave takes August Wilson's *The Piano Lesson* as her frame for the lessons of Hurricane Katrina: the material losses suffered by victims of the Hurricane, especially in the Lower Ninth Ward, pale in comparison to the losses of identity, history, and community.²¹ Van Cleave's analysis exposes a "dignity deficit" that legal rights or material recompense alone cannot repair.

Two essays by Professor Charles Calleros begin a trio of essays on deficits faced by people of color in education. Professor Calleros offers solutions to "the pipeline problem" that begin as early as grade school.²² In the second essay, Professor Calleros acknowledges the continuing need for remedy at the end of the educational pipeline, even as problems at the beginning of the pipeline are addressed.²³ Even as progress is made at various educational levels, the rights deficit in education merits continued attention to affirmative action as a potential remedy. Professor Bryan Adamson's essay on school finance reform litigation provides a look at financial deficits between racial minority districts and largely white districts in Cleveland, Ohio.²⁴ Adamson applies Professor Derrick Bell's interest convergence paradigm—generally, that gains by people of color are most possible when the gains also serve the interest of whites—to explain the gap between rich and poor districts and strategies for building coalitions to close the gap.²⁵

Finally, Professor Ernesto Hernandez-Lopez closes the symposium with a look at the rights deficit abroad, specifically in Mexico.²⁶

20. Rea L. Holmes, *How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters*, 43 CAL. W. L. REV. 75 (2006).

21. Rachel Van Cleave, *Property Lessons in August Wilson's The Piano Lesson and the Wake of Hurricane Katrina*, 43 CAL. W. L. REV. 97 (2006).

22. Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131 (2006).

23. Charles R. Calleros, *Law, Policy, and Strategies for Affirmative Action Admissions in Higher Education*, 43 CAL. W. L. REV. 151 (2006).

24. Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173 (2006).

25. *Id.*

26. Ernesto Hernandez-Lopez, *International Migration and Sovereignty Rein-*

Because of the interconnected nature of the United States and Mexico and continuous two-way migration between the two countries, his essay links age-old structures of Mexican law with interpretations of sovereignty that resonate in the current political environment, which is marked by the phenomenon of immigration.²⁷ The interdependence of the United States and Mexico, and the Conference's physical location at the juncture of the two countries, highlights the effect that the rights deficit at home has on the rights deficit abroad. Finally, participants in a plenary session at the Conference also examined the effectiveness of international institutions on closing the rights deficit.

IV. CONCLUSION

In his opening address to the Conference, as he has done in other work, Professor Frank Valdes referred to the cyclical nature of progress for subordinated people and the backlash that such progress sometimes entails.²⁸ With every advance forward, it often seems that there is an equal and opposite retrenchment of rights. The rights deficit is a thought device, a kind of "balance sheet" by which to measure where the United States, and indeed the world community, stands with respect to people of color and other oppressed groups. The "rights deficit" theme of the Conference was inspired by the cataclysmic proportions of Hurricanes Katrina and Rita and the difficulties in reconstruction caused by man-made, political failures. This Symposium used Hurricane Katrina as a benchmark for the state of our progress as a society. Moreover, the Symposium also considered the broader implications of the rights deficit, as well as strategies for paying down the debts that our democracy owes to its people.

terpretation in Mexico, 43 CAL. W. L. REV. 203 (2006).

27. *Id.*

28. Francisco Valdes, Professor of Law, University of Miami School of Law, Opening Address at the 2006 Western Law Professors of Color Conference: Pale Promises: Confronting the Rights Deficit (Mar. 31, 2006). *See also* Francisco Valdes, "*We Are Now of the View*": *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407 (2005).

